Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

_____ TERM, 1979

NO. 79-273

DAVID J. POTTER AND
CHARLES A. POTTER,
d/b/a POTTER & POTTER
ATTORNEYS AT LAW ..... *Petitioners*

VS.

Sam Jones, E. C. Hochendel, John Hardisty, Char-Lite Briquetts, Inc. & Pine-O-Pine Company ..... *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

ARNOLD, ARNOLD, LAVENDER & ROCHELLE, Ltd.
Attorneys at Law
507 Hickory Street
Texarkana, Arkansas 75502

By: E. BEN FRANKS
Attorney for Petitioners

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

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IN THE

Supreme Court Of The United States

——————— TERM, 1979

NO. ————

DAVID J. POTTER AND
CHARLES A. POTTER,
d/b/a POTTER & POTTER
ATTORNEYS AT LAW ..... *Petitioners*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Arkansas entered April 2, 1979, rehearing denied by the Supreme Court of Arkansas on the 21st day of May, 1979.

OPINIONS BELOW

The relevant Opinions of the Trial Court and the Supreme Court of Arkansas are abstracted in the Appendix to this Petition. Chronologically, said Opinions are as follows:

An unpublished Trial Court Decree on a portion of Cause No. 7442 in the Chancery Court of Lafayette County, Arkansas, styled "Sam Jones v. John Hardisty and Howard Richardson" dated April 12, 1972, filed of record April 17, 1972, said Decree further setting the remaining issues in the case for the 20th day of April, 1972. Said Decree being Appendix A. (R. 139, Vol. I)

Appendix B consists of an unpublished docket entry notation dated April 20, 1972, stating the Order of the Court dated April 12, 1972, was not to be construed as a final (appealable) judgment until verdict on the remaining issues is reached and spread of record. (R. 337, Vol. I)

Appendix C is entitled "Ruling of the Court, Thursday, April 20, 1972" found at R. 142, Vol. I, wherein the Court stated in open court that the Defendants have raised the question of entry of the Court's Preliminary Order dated April 12, 1972, and have requested the Court to direct the Clerk to refrain from spreading the Judgment on record since the time for appeal would run from April 12, 1972, and in order for the time for appeal might coincide, regardless of which party prevails, the Court would state that he considers the Order of April 12, 1972, to be an interlocutory order and not a final Order."

Appendix D is an Order of Dismissal without Prejudice as to cause No. 7442 in the Chancery Court of Lafayette County, Arkansas, dated January 20, 1975, and filed of record January 22, 1975. (R. 229, Vol. I)

Appendix H is an opinion of the Arkansas Supreme Court dated May 31, 1977 (R. 340, Vol. I) which re-

versed an earlier trial court order dismissing the Plaintiff's cause of action.

Appendix O is an unpublished "Judgment on Mandate" which was far beyond the Mandate of the Supreme Court and which adjudicated by final judgment all remaining issues. (R. 35, Vol. II)

Appendix V is an Opinion of the Arkansas Supreme Court dated April 2, 1979, from which Petition for Writ of Certiorari in the United States Supreme Court is now taken. (R. 162, Vol. II)

JURISDICTION

Jurisdiction of the Petition for a Writ of Certiorari arises under Part V, Rule 19 and 28 USC §1257(3). Petitioner would respectfully submit that there are special and important reasons to grant Petitioner's petition for the reason that the Supreme Court of Arkansas has decided a federal question of substance in a way probably not in accord with the applicable decisions of the United States Supreme Court.

The Opinion of the Arkansas Supreme Court was entered April 2, 1979. (R. 162-179, Vol. II) Rehearing was denied by the Arkansas Supreme Court on May 21, 1979. (R. 175, Vol. II) This Petition for Writ of Certiorari was filed within ninety (90) days of entry of the denial of rehearing making the Opinion of the Arkansas Supreme Court final in the state proceedings.

QUESTION PRESENTED

The question presented in this Petition for Writ of Certiorari is whether the state courts of Arkansas have

deprived Petitioners of their property without due process of law by refusal to allow them a trial.

AMENDMENT TO THE CONSTITUTION INVOLVED

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

STATEMENT OF THE CASE

The Petitioners are Attorneys at Law who represented parties in two separate and distinct lawsuits both of which arose from the parties' involvement in a charcoal briquetting facility. One suit was styled "H. E. Richardson v. Char-Lite Briquetts, Inc. and Pine-O-Pine Company", No. 7647 in the Chancery Court of Lafayette County, Arkansas. Petitioners were successful in obtaining a Judgment on behalf of their client, Mr. H. E. Richardson as Plaintiff in that case. The original trial court judgment was dated November 20, 1974. The second suit was styled "Sam Jones v. John Hardisty and Howard Richardson", cause No. 7442 in the Chancery Court of Lafayette County, Arkansas. The second suit, No. 7442, has a long and complex history beginning with the filing of the Plaintiff's Complaint on February 21, 1969. The Defendants controverted the Plaintiff's claim but filed a third party complaint against two additional third parties, E. C. Hochendel and Pine-O-Pine Company, claiming indemnity against the third party Defendants for any sums which may be due to the Plaintiff by virtue of the Plaintiff's complaint.

After the issues were joined, a trial was held on the 23rd day of March, 1972, and evidence was taken on the claims and defenses between the Plaintiff, Sam Jones, and the Defendants, John A. Hardisty and Howard E. Richardson. The trial was continued until 9:30 a.m. on the 20th day of April, 1972, for consideration of the third party claims and defenses in the event the Defendants were found to be liable as between Plaintiff and Defendants. If the Defendants prevailed, there would be no necessity for hearing evidence on the remaining issues. (R. 132, Vol. I) That continuance was set forth in an Order. (R. 138, Vol. I)

A decree dated April 12, 1972, was filed of record appearing, in all respects, to be a final judgment on behalf of Plaintiff against Defendants, said decree setting trial on all remaining issues for the 20th day of April, 1972, at 9:30 a.m.

On the date set for trial of the remaining issues, upon motion of the Defendants, the decree filed April 17, 1972, was declared in the record (R. 142, Vol. I) to be "an interlocutory order and not a final order". Contemporaneously with the announcement in open court, the Court made a docket entry notation dated April 20, 1972, stating that the order of the Court dated April 12, 1972, was "not to be construed as a final (appealable) judgment until verdict on the remaining issues is reached and spread of record." (R. 337, Vol. I) The court then proceeded to hear the evidence on all remaining issues as between third party Plaintiffs and third party Defendants. After the trial, the Court took the case under advisement and post trial briefs were filed. A decision by the trial judge was never rendered and the judge died on May 24, 1973, (R. 281, Vol. I) approximately one year and one month after the trial. The case remained totally inactive until January 20, 1975, when the case was dismissed for want of prosecution (the second time) pursuant to the court rules in effect in the state court. (R. 229, Vol. I)

On November 18, 1975, 10 months after the case had been dismissed, a garnishment action was filed by new counsel, not previously of record, against Char-Lite Briquetts, Inc. and Pine-O-Pine Company as judgment debtors to H. E. Richardson by virtue of Richardson's judgment date November 20, 1974. The garnishees filed a denial. No hearings were held and no judgment taken pursuant to said

garnishment. Thereafter, on April 20, 1976, a second garnishment action was filed by Plaintiff, Sam Jones, against the same garnishees, Char-Lite and Pine-O-Pine, who answered denying the garnishment. No trials were ever held concerning either garnishment actions. Thereafter, on May 21, 1976, the trial court entered an Order declaring the writs of garnishment to be a nullity and ordered the Clerk of the court not to issue any future writs of garnishment. (R. 240, Vol. I) That order was reconsidered and reissued on June 28, 1976 (R. 243, Vol. I), and again reconsidered for a third time upon the Plaintiff's Petition to vacate the Order of June 28, 1976, and again the court denied the Plaintiff's Petition to vacate the Order on October 13, 1976. (R. 325, Vol. I)

However, in response to the Petition to vacate the Order of June 28, 1976, Char-Lite Briquetts, Inc. and Pine-O-Pine filed a cross complaint and third party complaint against Petitioners herein based upon an alleged indemnity agreement executed by Petitioners along with Howard Richardson for Thirteen Thousand Nine Hundred Forty-Two & No/100 Dollars ($13,942.00) collected in payment of the Judgment against Char-Lite Briquetts and Pine-O-Pine. Those monies were paid on May 28, 1976. Therefore, the Petitioners for a Writ of Certiorari, Potter & Potter, were first made parties in this protracted litigation by a third party complaint filed September 7, 1976. (R. 264, Vol. I) The trial court denied the Plaintiff's Petition to set aside the Order of June 28, 1976, and that Order was appealed. The issue of the garnishment was not addressed in the Order denying the Petition to vacate. (R. 325, Vol. I) The Order of the Court was appealed and the Supreme Court of Arkansas delivered an Opinion dated

May 31, 1977. That Opinion remanded the case for "reinstatement of the Judgment". (R. 340, Vol. II. at 344) Again, no reference was made to the garnishment actions and no further instructions were directed to the trial court by the Opinion of the Arkansas Supreme Court.

Upon remand, further pleadings were filed. Specifically, the garnishees filed an Amended Response setting forth additional defenses to the garnishment action. (R. 15, Vol. II) Petitioners, Potter & Potter, filed a Motion to Intervene as interested parties in the garnishment action by virtue of the alleged indemnity agreement. The Motion to Intervene was granted by Order of the Court dated August 19, 1977. (R. 30, Vol. II) An intervention was filed raising numerous defenses to the garnishment. (R. 26, Vol. II) In addition to the intervention to defend against the garnishment action, Petitioners herein, Potter & Potter, filed a first Amended Answer to Cross-Complaint and Third Party Complaint (R. 20, Vol. II), generally denying all allegations, placing same in issue, and raising specific defenses including failure of consideration, and filed a Set-Off and Counterclaim against the garnishees. In addition, Petitioners, Potter & Potter, filed a Third Party action for subrogation against Howard Richardson, John Hardisty, E. C. Hochendel, and Pine-O-Pine. (R. 23, Vol. II) These pleadings were filed August 12, 1977. On September 2, 1977, garnishees answered the set off and counterclaim of Petitioners. Notwithstanding the joinder of issues on the garnishment, including the defenses raised by Petitioners upon their intervention in the garnishment action, and notwithstanding the joinder of issues raised in the Cross-Complaint and Answer thereto, Third Party Complaint of Petitioners and Answer thereto, Set-Off and Counterclaim

against garnishees by Petitioners, and the Third Party Complaint against a number of other parties in this action, a trial was never held. Instead, the trial court entered a "Judgment on Mandate" on November 18, 1977. The Court in its "Judgment on Mandate" went far beyond the directions of the Arkansas Supreme Court in its Opinion which merely instructed the Court to reinstate the original judgment. (R. 340, Vol. I at 344) The trial court in the Judgment on Mandate, granted a judgment in garnishment, although a hearing was never held in the garnishment action, and granted a judgment in favor of garnishees against Petitioners upon the alleged indemnity agreement, although a trial was never held, and finally, the trial court dismissed all defenses, claims for set-offs, counterclaims, and third party claims, all without a trial. (R. 35-37, Vol. II, Appendix O)

On December 1, 1977, Petitioners, Potter & Potter, filed an "Application for New Trial" in which Petitioners raised the issue of denial of due process under the United States Constitution by reason of a denial of a hearing, and consequentially an opportunity to make a record to be presented to the Arkansas Supreme Court in a trial de novo upon all issues and claims including the garnishment action. (R. 42-47, Vol. II, Appendix P) On December 20, 1977, the Court entered an Order setting a hearing solely upon the applications for new trial. (R. 73, Vol. II, Appendix Q) On December 20, 1977, a hearing was held to consider the applications for new trial. However, the Court stated before the hearing, in open court and upon the record, "I will tell you at the outset that I am going to overrule the Motion for New Trial." (R. 77, Vol. II) Notwithstanding that the "Judgment on Mandate" was filed November 18, 1977, and a hearing on applications for new trial was held on January

5, 1978 (R. 76, Vol. II), third party Defendants, E. C. Hochendel and John Hardisty filed answers to the third party complaint of Petitioners, Potter & Potter, on January 6, 1978, the day following the hearing on Petitioners' Application for New Trial. (R. 127-129, Vol. II) The trial court entered a formal order overruling Petitioners' application for new trial on January 11, 1978. (R. 131, Vol. II)

Upon appeal to the Arkansas Supreme Court, Petitioners again raised the federal constitutional issue of a denial of due process in Point III of their abstract and brief. (R. 161, A-J, Vol. II) Notwithstanding extensive argument on appeal of the Fourteenth Amendment to the United States Constitution, the Arkansas Supreme Court affirmed the trial court, with some modification on non-constitutional grounds. The Supreme Court noted that Petitioners argued that the Chancellor should not have entered a final decree without affording them a trial upon the issues raised by their pleadings and said, "We are not aware of any issues not disposed of by this Opinion, but in any event, the Chancellor, before entering his decree, afforded all parties an opportunity to make a record by proffering whatever testimony they wished to introduce. Thus it cannot be said that a hearing on the merits has been denied." (R. 168, Vol. II) Therefore, in compliance with Rule 23(f) of the United States Supreme Court Rules, Petitioners would show the Court that the federal question sought to be reviewed by this petition was raised in the trial court in Petitioners' application for new trial, which was the first possible time the issue could be raised after judgment was entered without a trial and was again raised on appeal in the Arkansas Supreme Court, without avail.

In short, Petitioners seek a Petition for Writ of Certiorari to the Arkansas Supreme Court, based upon the denial of due process guaranteed them by the Fourteenth Amendment to the United States Constitution, for the reason that they never were afforded a trial at which time a fair hearing could be held, in which witnesses could be called to establish their defenses and claims, and in which Petitioners could make a record to be utilized on appeal.

ARGUMENT

THE TRIAL COURT AND THE ARKANSAS SUPREME COURT VIOLATED PETITIONERS' UNITED STATES CONSTITUTIONAL RIGHT OF DUE PROCESS BY DENYING PETITIONERS A TRIAL.

As reflected in the Statement of the Case, the Petitioners were first made parties to the litigation in the trial court on September 7, 1976. The lawsuit began February 21, 1969, with Plaintiff's Complaint. The only trial that has ever been had upon the substantive issues raised in the pleadings of the case was held on two dates, March 23, 1972, and April 20, 1972, some four and one-half years prior to Petitioners being made parties in this cause. Petitioners' pleadings and the answers in response thereto were being filed as late as September 2, 1977. On November 17, 1977, the Court entered a "Judgment on Mandate" and filed same on November 18, 1977. That Judgment as it affected Petitioners was entered without benefit of a trial, as the record will reflect between R. 34 and R. 35, Vol. II.

Immediately upon the filing of the Judgment on Mandate, Petitioners filed an Application for New Trial (Appendix P, R. 42, Vol. II) in which Petitioners apprised the Court that they were prevented from having a fair trial and said in Paragraph II, (R. 43, Vol. II)

> ". . . Potter & Potter were denied due process upon all of the issues raised in their First Amended Answer to Cross Complaint and Third Party Complaint and in their prayer for a set-off and counterclaim against garnishees, and were further denied a hearing and a record on their intervention, and David J. Potter and Charles A. Potter were denied a hearing on their Third

> Party action against Howard Richardson, John Hardisty, E. C. Hochendel and Pine-O-Pine Company. Therefore, by denial of a hearing, applicants herein were denied a right to a record to be presented on appeal for a trial de novo and would make impossible a determination by the appellate court of the issues presented."

At the end of Paragraph III, Petitioners prayed:

> "For an opportunity to present evidence and testimony for consideration of the Arkansas Supreme Court in a trial de novo regarding all issues raised in the pleadings of applicants."

In Paragraph IV (R. 44, Vol. II) Petitioners stated:

> "The Judgment on Mandate entered a Judgment in Garnishment and Judgment on an indemnity agreement without affording an opportunity to be heard and without presentation of any evidence whatsoever. That the pleadings on file of the various parties raised issues of fact and are not subject to a summary judgment and a judgment should not have been entered without an opportunity for the various parties to adduce evidence on the issues. Furthermore, the Court, in Paragraph IV of the 'Judgment on Mandate', 'denied for want of equity relief sought by Defendants, Garnishees, and Intervenors by pleadings filed subsequent to May 31, 1977 (the date of the first Supreme Court decision remanding the case for reinstatement of the Sam Jones' Judgment). Again, no hearings were held on said pleadings and there is no basis in the record for said pleadings to be denied for want of equity. *Applicants herein have been denied due process guaranteed them under the Fourteenth Amendment to*

the United States Constitution and under the substantive laws of the State of Arkansas.'

"Therefore, the federal question was squarely raised immediately after the denial of due process occurred by the entry of the 'Judgment on Mandate.' "

It is important to note that the Application for New Trial of Petitioners was set for hearing on January 5, 1978. (See Order filed December 21, 1977 at R. 73, Vol. II) The record will reflect that at no time, prior to the hearing, were the appellants notified that the hearing on the Application for New Trial was for any other purposes. However, the trial court at R. 77, Vol. II, stated:

"Gentlemen, the purpose of this hearing is to complete the record in this case and resolve any remaining problems with the record. Mr. Tackett has advised me that he would like to enter something else into the record. For the record, I would say that if it has not been clear, this Court has tried to structure a judgment on the mandate in such a manner as to bring all of the issues to a close, and I have had access to, of course, the Court file. Mr. Compton had in his possession the transcript, and he, of course, made that available to me. I have your briefs. I have had Judge Rowan's notes. So, that is the basis upon which the Court has put up its Judgment. I think in October we were supposed to cover all issues, but I certainly want a complete record in this case. I think that's the essence of Mr. Tackett's Motion. *I will tell you at the outset that I am going to overrule the Motion for New Trial.* I propose at this time to allow you to make whatever record you want to. If anyone has any comment at this time, I would entertain it."

That hearing was set solely for the purpose of submitting sufficient evidence to justify the granting of a new trial at which time a full and complete hearing, with witnesses, cross-examination, etc. could be accomplished. It is clear from the record, that the only purpose of the hearing on January 5, 1978, was to consider the motions for new trial, which the Court said, "At the outset . . . . I am going to overrule the Motion for New Trial". The Arkansas Supreme Court responded to Petitioners' appeal upon the due process argument as follows:

"The Potters also argued that the Chancellor should not have entered a final decree without affording them a trial upon the issues raised by their pleadings. We are not aware of any issues not disposed of by this Opinion, but in any event the Chancellor, before entering his Decree, afforded all parties an opportunity to make a record by proffering whatever testimony they wished to introduce. Thus it cannot be said that a hearing on the merits has been denied."

Petitioners respectfully submit that the Supreme Court apparently confused what is meant in the federal Constitution by "due process" and confused the evidence. In fact, as the record will reflect, there were no proceedings and no record made between September 2, 1977, when the last pleading was filed and November 18, 1977, when the Judgment on Mandate was entered. (See R. 44-45, Vol. II) To say that a fair hearing, and an opportunity to fully present the Defendants' Evidence, was ever had is to ignore the record. From the date of the Application for New Trial filed by Petitioners on December 1, 1977, until the hearing on January 5, 1978, the only communication from the Court was an Order dated December 21, 1977, setting the Appli-

cation for New Trial for hearing. The only testimony given at the hearing on the Motions for New Trial was testimony designed to show the Court that errors had been made, and as reflected in the Application for New Trial, Petitioners desired a full hearing on all issues. A fair reading of the record can draw no other conclusion.

The fundamental requirement of "due process of law" is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which constitutional protection is invoked. *Anderson National Bank v. Luckett,* 64 S. Ct. 599, 321 U.S. 233, 88 L. Ed. 692, 151 A.L.R. 824. The Illinois courts have construed the due process required by the United States Constitution as an orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect rights before the Court having the power to hear and to determine the case. *Overton Crane & Shovel Company v. Federal Reserve Bank of Chicago,* 99 NE2d 14, appeal transferred 102 NE2d 663, 345 Ill. App. 284. The Florida Supreme Court held that due process of law guarantees to every citizen the right to have that course of legal procedure that has been established in the judicial system for protection and enforcement of private rights and contemplates that the Defendant shall be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure before judgment is rendered against him. *State ex rel. Gore v. Chillingworth,* 171 So. 649, 126 Fla. 645.

Other aspects of "due process" have been said to require that every person shall have protection of his day in court and an opportunity to be heard. *Hamerick v. Bryan,* 21 F. Supp. 392. ". . . . one must have had his day in court,

since it is of the essence of 'due process of law' that one must be given an opportunity to be heard." *Pink v. A. A. A. Highway Express,* 13 SE2d 337, 191 Ga. 502, *affirmed* 62 S. Ct. 241, 314 U.S. 201, 86 L. Ed. 152, 137 A.L.R. 957. The Louisiana Supreme Court has interpreted the federal due process requirement when it said "due process necessitates a hearing before final action, so that all shall have their day in court". *Parker v. Board of Barber Examiners,* 84 So.2d 80.

The parties to litigation must have their opportunity to present evidence. The United States Supreme Court has said "Where a case has been decided by a State Supreme Court in such a way that a party has not had a proper opportunity to present his evidence, he has been denied due process." *Saunders v. Shaw,* 37 S. Ct. 638, 244 U.S. 317, 61 L. Ed. 1163. The Illinois Supreme Court has held, that due process requires not only evidence, but an opportunity to be heard and to give evidence, and the summoning of a party to court and determination of issues against him without a hearing and determination of fact questions is of no avail. *Burkett v. Reliance Bank & Trust Company,* 11 NE 2d 6, 367 Ill. 196.

The right to a fair hearing is a requirement of due process. "The right to a fair and open hearing is assured to every litigant by the due process clause as a minimal requirement." *Railroad Commission of California v. Pacific Gas & Electric Company,* 58 S. Ct. 334, 302 U.S. 388, 82 L. Ed. 319. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defenses upon

the merits." *Cox v. Armour Fertilizer Works,* 35 S. Ct. 635, 237 U.S. 413, 59 L. Ed. 1027.

The North Carolina court has held that due process of law implies the right and opportunity to be heard and to *prepare* for a hearing. *State v. Wheeler,* 105 SE2d 615, 249 N.C. 187. Procedural "due process of law" contemplates a fair and open hearing before a legally constituted court or other authority, with notice and opportunity to present evidence and argument, representation by counsel, if desired, and information as claims of the opposing party, with a reasonable opportunity to controvert them. *Vernon v. State,* 18 So.2d 388, 245 Ala. 633.

And finally, the United States Supreme Court has held that due process of law means that the hearing must be a real one, and not a sham or a pretense. *Plako v. State of Connecticut,* 58 S. Ct. 149, 302 U.S. 319, 82 L. Ed 288. Petitioners would show the Court that the statement of the trial court that he was going to deny the Motion for New Trial even before hearing any arguments, testimony or other evidence to the contrary, was a sham and was not a "fair hearing" even upon the Application for New Trial.

CONCLUSION

In conclusion, Petitioners respectfully and earnestly pray that justice be done in this case and that the courts of Arkansas be required to afford to Petitioners an opportunity to develop evidence to support their pleadings and to have an opportunity to a fair trial of their defenses and other claims raised in their pleadings. Petitioners respectfully submit that the breach of due process in this case was not a minor breach, but was a blatant and flagrant violation of the Petitioners' rights guaranteed to them by the due process clause of the United States Constitution. The courts of Arkansas should not be allowed to so flagrantly violate the most basic constitutional rights of the Petitioners to a fair and impartial trial in the courts of this land.

Respectfully submitted,

E. BEN FRANKS

ARNOLD, ARNOLD, LAVENDER & ROCHELLE, Ltd.
Attorneys at Law
507 Hickory Street
Texarkana, Arkansas 75502

By: E. BEN FRANKS

Attorney for Petitioners

Appendix

APPENDIX "A"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

DECREE

On the 23rd day of March, 1972, this matter came on to be heard and, by agreement of the parties and with the approval of the Court, oral testimony was taken upon the issue raised by Plaintiff's Complaint and Defendants' Answer and Cross-Complaint. No evidence was taken on the issues raised by the Third Party Pleadings. It was agreed that all issues other than those presented by Plaintiff's Complaint and Defendants' Cross-Complaint would be reserved and tried on April 20th and 21st, 1972, if trial proved to be necessary.

All parties were given until the 7th day of April, 1972, to file their briefs. Plaintiffs declined to file a brief, and Defendants' brief having been considered by the Court, together with all evidence and the pleadings, now, on this 12th day of April, 1972, the Court finds that plaintiff should have judgment against the defendants, and each of them, on his note in the principal sum of $30,000.00, together with interest at the rate of six (6%) percent per annum from

the 28th day of September, 1967, and an attorney's fee in the amount of $3,000.00, together with his costs herein expended.

The Cross-Complaint of Defendants is dismissed.

This cause is set for trial on the 20th day of April, 1972, at 9:30 a.m., at Lewisville, Arkansas, on all remaining issues.

IT IS SO ORDERED.

/s/ Jim Rowan, Chancery Judge

FILED
17 day of April, 1972 at 9:00 o'clock a.m.
Joe T. Rhodes, Chancery Clerk
By: /s/ Theda J. Perry, D.C.

Dated 12 Apr 72
Recorded in Book T, page 44.
Joe.

APPENDIX "B"

CHANCERY DOCKET
CASE NO. 7442

(Relevant entries only)

Date of Orders	
4-12-72	Decree filed 4-17-72.
20 Apr. 72	Trial of issues raised by 3rd party pleadings commenced. Order of 12 Apr 72 is not to be construed as final (appealable) judgment until verdict on the remaining issue is reached and spread of record. Taking of testimony concluded. Briefs to be filed by all parties by 23 May 72.
5-24-72	3rd-Party Defendants Brief.
5-25-72	Trial brief of John Hardisty and Howard Richardson.
5-25-72	Brief of Defendants.
6- 8-72	Trial Brief for E. C. Hochendel.
1-20-75	Chancery "T" at page 516.
11-18-75	Allegations & Interrogatories & Garnishments.
12-11-75	Answer of Garnishee.
4-20-76	Allegations & Interrogatories w/Writ of Garnishment.
4-20-76	Allegations & Interrogatories w/Writ of Garnishment. Served 4-20-76.
5-10-76	Answer of Garnishees.
5-25-76	Order.
6-15-76	Notice of Appeal.
7- 1-76	Order.
7-12-76	Notice of Appeal.
8- 2-76	Petition to Vacate Order of June 28, 1976.

8- 2-76	Memorandum in Support of Petition to Vacate Order of June 28, 1976.
8- 4-76	Response to Petition to Vacate.
9- 3-76	Petition to Extend Time to Effect Appeal.
9- 7-76	Separate Response of Char-Lite Briquetts, Inc. & Pine-O-Pine Company to Petition to Vacate Order of June 28, 1976.
9- 7-76	Cross-Complaint & Third Party Complaint.
9- 9-76	Ans. to Cross-Complaint & 3rd Party Complaint.
9-20-76	Petition to Vacate Presented on Oral Testimony.
10-13-76	Order.
10-18-76	Designation of Record on Appeal.
10-18-76	Notice of Appeal.

APPENDIX "C"

RULING OF THE COURT
THURSDAY, APRIL 20, 1972

THE COURT: The defendants have raised the question of entry of the Court's Preliminary Order dated April 12, 1972, and have requested that the Court direct the Clerk to refrain from spreading the Judgment on record since the time for appeal would run from April 12, 1972, and in order that time for appeal might coincide, regardless of which party prevails, the Court would state that he considers the Order of April 12, 1972, to be an Interlocutory Order and not a Final Order.

APPENDIX "D"

IN THE CHANCERY COURT OF LAFAYETTE
COUNTY, ARKANSAS
FIRST DIVISION

ORDER

Pursuant to Rule No. 10 of the Uniform Rules and the Standing Order of this Court dated December 1, 1970, the cases listed on the page attached hereto are hereby dismissed without prejudice for want of prosecution.

Dated this 20th day of January, 1975.

/s/ C. S. Plunkett, Chancellor

. . .

7442 — Jones v. Hardety, et al.

. . .

FILED: 22nd day of January, 1975 at 8 o'clock a.m.

APPENDIX "E"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDESTY AND
HOWARD RICHARDSON ..... *Defendants*

AND

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

CROSS COMPLAINT AND THIRD PARTY COMPLAINT

Come now Char-Lite Briquetts, Inc. and Pine-O-Pine Company and for their Cross Complaint and Third Party Complaint herein would respectfully show the Court as follows:

I.

That the Petition to Vacate Order of June 28, 1976, filed herein in behalf of Sam Jones, Plaintiff, prays in the alternative that Sam Jones have judgment against Char-Lite Briquetts, Inc. and Pine-O-Pine Company, the Garnishees. That on the 28th day of May, 1976, Howard Richardson, individually, and David J. Potter, representing Charles A. Potter and David J. Potter, d/b/a Potter and Potter, a partnership, signed an Indemnity Agreement whereby said parties agreed to hold harmless and indemnify Char-Lite Briquetts, Inc. and Pine-O-Pine Company against all judgments by virtue of garnishment heretofore instituted, not to exceed Thirteen Thousand Nine Hundred

Forty-two and 00/100 ($13,942.00), in the above styled and numbered cause. That a copy of said Indemnity Agreement is attached to this pleading as Exhibit "A" and made a part hereof. That the reference in said Indemnity Agreement to David J. Potter as Attorney for Plaintiff and R. Gary Nutter as Attorney for Defendants refers to their representation in Cause No. 7647 in the Chancery Court of Lafayette County, Arkansas, wherein Howard Richardson was the Plaintiff and Char-Lite Briquetts, Inc. and Pine-O-Pine Company were the Defendants.

II.

That, pursuant to the Indemnity Agreement attached hereto, should any judgment be rendered against Char-Lite Briquetts, Inc., and/or Pine-O-Pine Company, the Court should Order and require said parties to be held harmless, made whole by and have a Judgment against Howard Richardson and Charles A. Potter and David J. Potter, d/b/a Potter and Potter, a partnership, for the amount of said judgment not to exceed Thirteen Thousand Nine Hundred Forty-two and 00/100 ($13,942.00).

WHEREFORE, PREMISES CONSIDERED, Char-Lite Briquetts, Inc. and Pine-O-Pine Company pray that should any judgment be granted against them in this cause that the judgment for indemnification in the amount of said judgment be granted in their favor against Howard Richardson and Charles A. Potter and David J. Potter, d/b/a Potter and Potter, a partnership and for all other equitable and proper relief to which they are entitled.

By: /s/ R. Gary Nutter
Attorney for Char-Lite Briquetts,
Inc. and Pine-O-Pine Company

APPENDIX "F"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS

SAM JONES ..... *Plaintiff*

vs. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

ANSWER TO CROSS COMPLAINT AND
THIRD PARTY COMPLAINT

NOW COME Howard Richardson and David J. Potter and Charles A. Potter, d/b/a Potter & Potter, a partnership, and for their answer to the Cross Complaint and Third Party Complaint of Garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, state, allege and say the following, to-wit:

I.

That the allegations contained in Paragraph I are admitted.

II.

That the allegations of Paragraph II are denied except as to any judgments by virtue of previous garnishments, which Defendant Richardson and Third Party Defendants Potter & Potter strenuously deny. Furthermore, in the affirmative, Cross Defendant and Third Party Defendants adopt in toto their previous pleadings and the allegations of the Garnishees in Paragraph V of their Answer. That a

valid garnishment has never been issued, that the previous orders of this Court are valid, that this cause has been dismissed and no judgment has ever been rendered, that the previous Answers in Garnishment by the Garnishees are factual and do not entitle the Plaintiff, Sam Jones, in the previously dismissed case to any relief. That the Cross Defendant and Third Party Defendants' liability, if any, should arise by virtue of the Indemnity Agreement only out of previous garnishments filed.

WHEREFORE, PREMISES CONSIDERED, Cross Defendant, Howard Richardson, and Third Party Defendants, David J. Potter and Charles Potter, d/b/a Potter & Potter, Attorneys at Law, a partnership, pray that the previous Order and Judgment of this Court be continued in effect, that the Plaintiff take nothing by virtue of his previous attempts at garnishment, and that all causes of action by Plaintiff or Garnishees be dismissed and that Cross Defendant, Howard Richardson, and Third Party Defendants be awarded judgment for costs herein expended and all other just and proper relief to which they show themselves to be entitled, both at law and in equity.

By: /s/ David J. Potter,
Attorney for Cross Defendant
and Third Party Defendants

FILED 9th day of Sept., 1976 at 9 o'clock a.m.

/s/ Joe T. Rhodes, Chancery Clerk

APPENDIX "G"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishee*

ORDER

On this 20th day of September, 1976, this cause comes on to be heard upon the petition to vacate the order of June 28, 1976, filed herein by the plaintiff, Sam Jones, the response to petition to vacate filed herein by the defendants, John Hardisty and Howard Richardson, the separate response of the garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, the cross-complaint and third-party complaint of Char-Lite Briquetts, Inc. and Pine-O-Pine Company, the answer to said cross-complaint and third-party complaint in behalf of the defendants, John Hardisty and Howard Richardson. The plaintiff appeared in person and by and through his attorneys, Robert C. Compton and Shelby R. Blackmon, and the defendants appeared through their attorney, David J. Potter, and the garnishees and third-party plaintiffs, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, appeared through their attorney, Gary Nutter. Thereupon, all parties announced ready and the cause was submitted to the Court upon the pleadings, testimony taken *ore tenus* and exhibits thereto, and argu-

ments of counsel following which the matter was taken under advisement.

The court now being well and sufficiently advised finds that the petition of the plaintiff to vacate the Court's order of June 28, 1976, should be denied. With this finding, there is no action by the Court needed with reference to the cross-complaint and third-party complaint of the garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company.

IT IS, THEREFORE, BY THE COURT ORDERED that the plaintiff's petition to vacate the order of June 28, 1976, is denied.

/s/ C. E. Plunkett, Chancellor
October 13, 1976

FILED 15th day of Oct., 1976 at 8 o'clock a.m.
/s/ Joe T. Rhodes, Chancery Clerk
Recorded in Book "U", Page 271.

APPENDIX "H"

DIVISION 1

SUPREME COURT OF ARKANSAS

No. 76-379

SAM JONES, *Appellant*	Opinion Delivered MAY 31, 1977
v.	Appeal from Lafayette Chancery Court
JOHN HARDESTY, ET AL, *Appellees*	CHARLES E. PLUNKETT, *Chancellor*
	Reversed and remanded

ELSIJANE T. ROY, *Justice*

On February 21, 1969, appellant Sam Jones instituted an action in Lafayette Circuit Court against appellees John Hardesty and Howard Richardson seeking judgment for $30,000 on a promissory note. After answer, and upon motion the cause was transferred to Chancery Court and there appellees filed a counterclaim and also third party complaints.

On March 23, 1972, testimony was heard on the complaint and counterclaim but continued for a hearing on the third party complaints until April 20, 1972.

By decree dated April 12, 1972, and filed April 17, 1972, appellant was awarded judgment against appellees in the principal sum of $30,000 with interest, attorney's fee and costs and appellees' cross complaint was dismissed.

On April 20, 1972, the trial of appellees' third party complaints commenced, neither appellant nor his attorney being present.

Before the testimony began attorney for appellees asked the court to withhold "the effect and entry of the original judgment until the entire case can be adjudicated and then our ten days' notice to appeal would run. We would have thirty days to appear and ten days to file notice of appeal."

The court in response to this request stated, ". . . [I]n order that time for appeal might coincide, regardless of which party prevails, the Court would state that he considers the Order of April 12, 1972, to be an Interlocutory Order and not a Final Order." A docket notation to this effect also was made; however, the decree itself was never vacated or modified in any manner.

On April 20, 1972, after completing the testimony in the trial of the third party complaints of appellees, briefs were submitted and the last one was filed June 8, 1972.

No further action was taken by Judge Rowan prior to his death on May 24, 1973. Following his death an interim chancellor served through December 31, 1974. The newly elected chancellor assumed office January 1, 1975, and under authority of Rule 10 of the Uniform Rules and the Standing Order of the Court, without notice to appellant or his attorney, appellant's case, listed with forty others, was dismissed "for want of prosecution."

In an independent action appellees herein had obtained judgment against Pine-O-Pine, one of the third party defendants herein. That judgment was appealed and affirmed on April 19, 1976.[1] Before the appeal had been decided

[1]Char-Lite Briquetts, Inc. and Pine-O-Pine Company, appellants v. H. E. Richardson, E. C. Hochendel and W. A. Woolman, appellees, No. 75-126, not designated for publication.

appellant, through his then attorney, caused a writ of garnishment to be issued against Pine-O-Pine et al, which answered that the judgment against the corporation in favor of appellees was not final.

On April 20, 1976, appellant then had issued a new writ of garnishment, the first one having been dismissed pending outcome of the appeal as to Pine-O-Pine. The court entered an order on May 21, 1976, holding appellant had no judgment, that his cause had been dismissed and the writs of garnishment were a nullity. On June 28, 1976, the matter was reconsidered and the trial judge reached the same conclusion as previously.

On September 20, 1976, the matter was again reconsidered upon the oral testimony of appellant's original attorney[2] and the attorney for appellees who was called as a witness by appellant. At the conclusion of questions by the attorney for appellant, counsel for appellees asked permission to remain on the stand and stated, "If the Court please, I will add my testimony as a witness but as rebuttal to Mr. Compton[3] and also further enlighten the Court on some facts," after which about six pages of testimony by counsel followed. Nevertheless counsel did not withdraw thereafter but continued to represent appellees on appeal, including oral argument before this Court. After the testimony was taken the trial court again refused to vacate the judgment of June 28, 1976, and accordingly this appeal is brought.

Appellant contends a final judgment was entered as

[2]The record reflects that appellant's original attorney took no part in further proceedings after he was called to testify.

[3]Mr. Compton had not taken the stand, but was examining appellees' attorney.

to his cause on April 12, 1972, and that the subsequent rulings of the court dismissing appellant's cause for failure of prosecution deprive him of his property without due process of law.

The court's decree dated April 12, 1972, filed April 17, 1972, reads as follows:

> On the 23rd day of March, 1972, this matter came on to be heard and, by agreement of the parties and with the approval of the Court, oral testimony was taken upon the issue raised by Plaintiff's Complaint and Defendants' Answer and Cross-Complaint. No evidence was taken on the issues raised by the Third Party Pleadings. *It was agreed that all issues other than those presented by Plaintiff's Complaint and Defendants' Cross-Complaint would be reserved and tried on April 20th and 21st, 1972, if trial proved to be necessary.*
>
> All parties were given until the 7th day of April, 1972, to file their briefs. Plaintiff declined to file a brief, and Defendants' brief having been considered by the Court, together with all evidence and the pleadings, now, on this 12th day of April, 1972, *the Court finds that plaintiff should have judgment against the defendants, and each of them, on his note in the principal sum of* $30,000, together with interest at the rate of six (6%) percent per annum from the 28th day of September, 1967, and an attorney's fee in the amount of $3,000.00, together with his costs herein expended.
>
> The Cross-Complaint of Defendants is dismissed.
>
> This cause is set for trial on the 20th day of April, 1972,

> at 9:30 a.m., at Lewisville, Arkansas, on *all remaining issues.*
>
> IT IS SO ORDERED.
>
> /s/ Jim Rowan, Chancery Judge
>
> (Italics supplied)

Appellees never requested any modification of the original decree, only that effect of the judgment be withheld so that appeal time would run concurrently with that of the third party actions. The court only intended the judgment to be held up for appeal purposes.

In *Holloway v. Berezen,* 208 Ark. 849, 188 SW2d 298 (1945), this Court stated:

> * * * A docket notation is not an entry of judgment or decree upon the records of the court and cannot be used to supply a deficiency in the record of the Court. (Citing *Herrod v. Larkins,* 183 Ark. 509, 36 SW2d 667; *City of Monticello v. Kimbro,* 206 Ark. 503, 176 SW2d 152.) * * *

See also *Baugh v. City of Pine Bluff,* 257 Ark. 768, 520 SW 2d 275 (1975).

16 Am. Jur. 2d Constitutional Law §379 (1964), states:

> Rights acquired by a judgment are property rights which cannot be taken without due process of law. * * * (Citing numerous cases in support of the statement.)

We find the delay was occasioned because the third party action was not decided by the original trial court nor his successors in office. This phase of the case has been

awaiting decision since June 8, 1972. It would be unconscionable to penalize appellant and deprive him of his judgment under these circumstances. Accordingly the cause is remanded for reinstatement of the judgment.

We also call attention to the case of *Canal Insurance Company v. Hall*, 259 Ark. 797, 536 SW2d 702 (1976), wherein we stated:

> We must again take this occasion to reiterate our disapproval of an attorney testifying in an action in which he is an advocate. *McWilliams & Kimes v. Tinder*, 256 Ark. 994, 511 SW2d 480 (1974); *Watson v. Alford*, 255 Ark. 911, 503 SW2d 897 (1974); *Montgomery v. 1st Nat'l Bank of Newport*, 246 Ark. 502, 439 SW2d 299 (1969); *Old American Life Ins. Co. v. Taylor*, 244 Ark. 709, 427 SW2d 23 (1968); and *Rushton v. First Nat'l Bank of Magnolia*, 244 Ark. 503, 426 SW2d 378 (1968).

Reversed and remanded.

We agree. Harris, C.J., and George Rose Smith and Holt, JJ.

APPENDIX "I"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

vs. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

AMENDED RESPONSE OF CHAR-LITE BRIQUETTS, INC. AND PINE-O-PINE COMPANY TO PETITION TO VACATE ORDER OF JUNE 28, 1976

Come now Char-Lite Briquetts, Inc. and Pine-O-Pine Company and for their Amended Response to the Petition to Vacate Order of June 28, 1976, would respectfully show the Court as follows:

I.

That said Respondents re-allege and adopt the pleadings and allegations of their original response filed herein.

II.

That said Respondents relied upon the order of this Court dated May 21, 1976, vacating the Judgment rendered herein in making any payments to Howard Richardson as a result of Cause No. 7647 in the Chancery Court of Lafayette County.

III.

That, although Respondents were not notified by

Registered Mail as required by Ark. Stat. 25-301, they had actual knowledge of the potential claim for an attorney's lien for David J. Potter and the law firm of Potter and Potter in Cause No. 7647 in the Chancery Court of Lafayette County.

IV.

That the reinstatement of the Judgment in this cause as required by the opinion of the Arkansas Supreme Court delivered May 31, 1977, should be accomplished as of the date of the opinion of the Supreme Court in this case.

WHEREFORE, PREMISES CONSIDERED, Respondents Char-Lite Briquetts, Inc. and Pine-O-Pine Company pray that any judgment against Char-Lite Briquetts, Inc. and Pine-O-Pine Company be denied and that Petitioner go hence with his costs.

By: /s/ R. Gary Nutter,
Attorney for Char-Lite
Briquetts, Inc. and
Pine-O-Pine Company

FILED 19th day of July, 1977 at 8 o'clock a.m.
/s/ Joe T. Rhodes, Chancery Clerk.

APPENDIX "J"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

AND

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

FIRST AMENDED ANSWER TO CROSS COMPLAINT
AND THIRD PARTY COMPLAINT

NOW come Howard Richardson, individually, and David J. Potter and Charles A. Potter, d/b/a Potter & Potter, a partnership, by and through their attorney, Boyd Tackett, and for their First Amended Answer to the Cross Complaint and Third Party Complaint of Garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, state, allege and say the following, to-wit:

I.

Defendant Howard Richardson and Third Party Defendants David J. Potter and Charles A. Potter, d/b/a Potter & Potter, deny each and every, all and singular, the material allegations contained in the Cross Complaint and Third Party Complaint of Garnishees, except as hereinafter specifically admitted, and demand strict proof thereof.

II.

That Howard Richardson and David J. Potter admit the execution of Exhibit "A" attached to the Cross Complaint and Third Party Complaint.

III.

Affirmatively, Defendant Howard Richardson and Third Party Defendants David J. Potter and Charles A. Potter, d/b/a Potter & Potter, a partnership, allege a failure of consideration for the Indemnity Agreement according to its terms rendering same unenforceable as a contract.

IV.

Further in the affirmative, Third Party Defendant, David J. Potter and Charles A. Potter, d/b/a Potter & Potter, a partnership, would show, in addition to a failure of consideration as to them, that in the event they are responsible in anywise under the Agreement, marked "Exhibit A", attached to the Cross Complaint and Third Party Complaint, that their responsibility is that of a surety and guarantor of any sums garnishable as being owed to Howard E. Richardson by Garnishees. Furthermore, Char-Lite Briquetts, Inc. and Pine-O-Pine Company were merged pursuant to the laws of Arkansas and their claims and obligations are merged.

V.

SET-OFF AND COUNTERCLAIM
AGAINST GARNISHEES

That in the alternative, and alternative only, Cross Defendant, Howard Richardson, and Third Party Defendants, David J. Potter and Charles A. Potter, d/b/a Potter & Potter, a partnership, are entitled to set-offs and counter-

claim against Garnishees in the amount of $14,000.00 plus interest at the rate of six percent (6%) per annum from the due date, all of which are contained in a certain Capital Stock Purchase Agreement dated August 31, 1970 and Letter Addendum thereto dated September 1, 1970, previously made of record in this cause. That H. E. Richardson is entitled to a set-off against any obligation he might have pursuant to the "Indemnity Agreement" made the basis of Garnishees' Cross-Complaint and Third Party Complaint. That David J. Potter and Charles A. Potter, Third Party Defendants, as sureties and guarantors of Defendant Howard Richardson, are entitled to benefit of all defenses and set-offs which Defendant Howard Richardson might have against Garnishees in their Cross-Complaint and Third Party Complaint. That by virtue of the set-offs of the obligation of Char-Lite Briquetts, Inc. and Pine-O-Pine Company, to pay $14,000.00 plus interest to Sam Jones in satisfaction of the alleged debt inuring to the benefit of Sam Jones as the alleged creditor and Howard Richardson as the alleged debtor and by virtue of the breach of the obligation of Garnishees to pay said debt, Defendant Howard Richardson and Third Party Defendants Potter & Potter are entitled to a complete set-off and Garnishees should take nothing by virtue of the alleged Indemnity Agreement.

WHEREFORE, PREMISES CONSIDERED, Cross-Defendant and Third Party Defendants pray that should any claim be allowed to Sam Jones by virtue of a garnishment action against Char-Lite Briquetts, Inc. or Pine-O-Pine Company, that Garnishees be denied their Cross-Complaint and Third Party Complaint against Howard Richardson and David J. Potter and Charles A. Potter, d/b/a Potter &

Potter for the reasons set out hereinabove, or in the alternative, that said Cross-Complaint and Third Party Complaint by Garnishees be cancelled by virtue of set-offs and counterclaims of Howard Richardson and Third Party Defendants in their capacity as sureties for Howard Richardson; further in the alternative, in the event any judgment is allowed to Garnishees upon their Cross-Complaint and Third Party Complaint, said judgment should be the primary responsibility of Howard E. Richardson to which Third Party Defendants should be subrogated by a judgment against Howard E. Richardson; for costs herein expended, and for all other just and proper relief to which Cross-Defendant and Third Party Defendants may show themselves to be entitled, both at law and in equity.

By: /s/ Boyd Tackett,
Attorney for Defendant,
Howard Richardson and
Third Party Defendants,
David J. Potter & Charles
A. Potter

FILED 12th day of August, 1977 at 8 o'clock a.m.
/s/ Joe T. Rhodes, Chancery Clerk.

APPENDIX "K"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

AND

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishee*

THIRD PARTY COMPLAINT

NOW COMES David J. Potter and Charles A. Potter, d/b/a Potter & Potter, a partnership, by and through their attorney, Boyd Tackett, and for their third party action against Howard Richardson, John Hardisty, E. C. Hochendel, and Pine-O-Pine Company, state, allege and say the following, to-wit:

I.

In the event Plaintiff is successful to any degree in his garnishment action against Pine-O-Pine, and in the event Pine-O-Pine receives a judgment against Third Party Plaintiffs, Potter & Potter, for any alleged debt to Sam Jones by virtue of his Complaint filed herein, Potter & Potter should receive by judgment a subrogation interest against Howard Richardson and John Hardisty, jointly and severally, as well as E. C. Hochendel upon any liability he might have to John Hardisty upon his indemnity agree-

ment, and against Pine-O-Pine Company for its liability upon an indemnity agreement to pay Sam Jones any portion of the debt alleged by Plaintiff in his Complaint.

WHEREFORE, PREMISES CONSIDERED, Third Party Plaintiffs, Potter & Potter, pray, in the event of a judgment against them upon any portion of the garnishment action by Plaintiff against Pine-O-Pine upon their indemnity agreement as indemnifier, or surety, that they be awarded a subrogation interest against Defendants, Howard Richardson and John Hardisty and against all other parties including E. C. Hochendel and Pine-O-Pine Company for any liability they might have for the payment of any of the debt alleged by Plaintiff in his Complaint.

By: /s/ Boyd Tackett,
Attorney for Third Party
Plaintiffs, David J. Potter
and Charles A. Potter,
d/b/a Potter & Potter

FILED 16th day of August, 1977 at 8 o'clock a.m.
/s/ Joe T. Rhodes, Chancery Clerk.

APPENDIX "L"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

AND

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishee*

INTERVENTION

NOW come Defendant Howard Richardson, individually, and David J. Potter and Charles A. Potter, d/b/a Potter & Potter, a partnership, hereinafter referred to as Intervenors, and for their Intervention into the garnishment action of Plaintiff against Garnishees, state, allege and say the following, to-wit:

I.

That Plaintiff has instituted two garnishment actions on November 18, 1975 and April 20, 1976, respectively. That said garnishments alleged a judgment in the Lafayette County Chancery Court on April 12, 1972. That said allegation of judgment was not true, that the order entered was a "preliminary order" and the effect of same was withheld.

II.

The garnishment action of November 18, 1975 was declared abandoned by the Arkansas Supreme Court in its

Opinion in this cause. The remaining garnishment dated April 20, 1976 should be denied for all reasons set forth in Garnishees' Response to Garnishment and in the Amended Response of Char-Lite Briquetts, Inc. and Pine-O-Pine Company to the Petition to Vacate the Order of June 28, 1976.

III.

In addition to the foregoing, Intervenors would show that Plaintiff was guilty of laches in failing to pursue his garnishment action of April 20, 1976 after answer was duly filed denying any debt to Defendant and Intervenor Howard Richardson. That Plaintiff should have pursued his garnishment action timely and should have had that cause determined promptly. That Plaintiff was guilty of laches which had an injurious and prejudicial effect upon Intervenors and Garnishees. That Plaintiff cannot now maintain said garnishment action.

IV.

In the alternative, and in the alternative only, Intervenors would respectively show the Court that only such sums held by Garnishees and due and payable to Howard Richardson are garnishable. That there existed, pursuant to Ark. Stat. 25-301, a prior lien upon the proceeds from Cause No. 7647 in the Chancery Court of Lafayette County in favor of David J. Potter and the partnership of Potter & Potter, Attorneys at Law. That other sums were due and payable by virtue of said judgment to the First National Bank of Mobile, Alabama. That only such sums as were legally receivable by Howard Richardson after the payment of all debts, liens, and other obligations upon the

proceeds of said suit in Cause No. 7647 are subject to garnishment.

V.

That the trial court withdrew the Judgment of April 12, 1972 and the effect of same was withheld pending a determination of the entire case. That upon equitable grounds, the Arkansas Supreme Court has ordered that the previous Interlocutory Order of the trial court be "reinstated" by the trial court. Pursuant to the Opinion of the Arkansas Supreme Court delivered May 31, 1977, this Honorable Court should reinstate the Judgment. From the date of the reinstatement of the Judgment, Defendants should have ten (10) days before any execution, garnishment, or other action upon the Judgment could be taken. After ten days from the reinstatement of the Judgment, Plaintiff will be free to pursue any legal remedies for the collection of said Judgment unless and until a supersedeas bond, with good and sufficient sureties, shall be placed to suspend such execution.

VI.

That to determine that the Judgment withdrawn by the trial court on the 20th day of April, 1972 and not reinstated to date, constituted a valid final judgment upon which execution should issue would be a violation of Arkansas law and a violation of Defendant's rights to due process and equal protection guaranteed to him under the Arkansas and Federal Constitutions.

WHEREFORE, PREMISES CONSIDERED, Intervenors pray that the garnishment of November 18, 1975 be declared abandoned by virtue of the Opinion of the Arkansas Supreme Court in this cause, that the garnishment

action dated April 20, 1976 be declared invalid for the reason that there was not at the time of issuance of said garnishment a valid and subsisting final judgment upon which said garnishment should be based; in the alternative, that the Plaintiff abandoned the garnishment of April 20, 1976 and was guilty of laches in the failure to prosecute timely said garnishment actions; further, that said garnishment actions be denied for reason that the answer of the Garnishees reflects that at the time of the garnishment, there had not been a final adjudication of the debt and the Garnishees had consistently denied any obligation for any debts, and at the time of said garnishment on April 20, 1976, said debt had not matured by a judgment in the trial court pursuant to Mandate of the Arkansas Supreme Court and, in fact, the Opinion of the Arkansas Supreme Court had not become final and a mandate had not been issued as of the date of said garnishment; further in the alternative, Intervenors pray that should either of the garnishment actions of November 18, 1975 or April 20, 1976 be allowed, that the amount garnishable should be limited to the amount which Howard Richardson was entitled after payment of all costs, attorney fee liens, and other claims justly due and which preceeded the right of Howard Richardson to the proceeds of said suit; for costs herein expended and all other just and proper relief to which Intervenors may show themselves to be entitled, both at law and in equity.

By: /s/ Boyd Tackett,
Attorney for Intervenors

APPENDIX "M"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

AND

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

ORDER

NOW on this 19th day of August, 1977, came on for consideration the Motion of Howard Richardson, individually, and David J. Potter and Charles A. Potter, d/b/a Potter & Potter, a partnership, for an order allowing intervention in the garnishment actions of Plaintiff against Garnishees in this cause. For good cause shown, IT IS HEREBY ORDERED that said persons be allowed to intervene in the consideration of the garnishment actions and to file Intervention herein.

/s/ C. E. Plunkett, Chancery Judge

FILED 26th day of August, 1977 at 8 o'clock a.m.
/s/ Joe T. Rhodes, Chancery Clerk.

Recorded in Chancery "U", page 469.

APPENDIX "N"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

ANSWER OF CHAR-LITE BRIQUETTS AND PINE-O-PINE COMPANY TO SET-OFF AND COUNTERCLAIM OF HOWARD RICHARDSON AND DAVID J. POTTER AND CHARLES A. POTTER, D/B/A POTTER AND POTTER, A PARTNERSHIP

Come now Char-Lite Briquetts, Inc. and Pine-O-Pine Company and for their Answer to the Set-Off and Counterclaim against Garnishees filed by Howard Richardson and David J. Potter and Charles A. Potter, d/b/a Potter and Potter, a partnership, state, allege and say the following:

I.

Said parties deny each and every material allegation contained in the Set-Off and Counterclaim against Garnishees and demand strict proof thereof.

II.

Said parties specifically deny that they have any obligation to pay $14,000.00 plus interest to Sam Jones in

satisfaction of any alleged debt inuring to the benefit of Sam Jones as an alleged creditor or Howard Richardson as an alleged debtor.

III.

In addition to the foregoing, said parties would show that Howard Richardson was guilty of laches in failing to pursue, for the period of more than five years, any alleged judgment or cause of action which he alleges against Char-Lite Briquetts, Inc. and Pine-O-Pine Company concerning an alleged $14,000.00 debt to Sam Jones. That the defense of laches is also applicable to David J. Potter and Charles A. Potter, d/b/a Potter and Potter, a partnership as sureties and guarantors of Howard Richardson.

IV.

Pleading further in the affirmative, said parties allege that Cause No. 76-47 styled H. E. Richardson, E. C. Hochendel and W. A. Woolman vs. Char-Lite Briquetts, Inc. and Pine-O-Pine Company involved claims and counterclaims between all of the parties to said suit and was tried in the Chancery Court of Lafayette County, Arkansas, and appealed to the Arkansas Supreme Court. That in the alleged claim which Howard Richardson has against Pine-O-Pine Company and Char-Lite Briquetts, Inc. was a compulsory claim in said suit which has been litigated to its conclusion and should be considered res judicata or a matter adjudged or a matter settled by judgment in said suit.

WHEREFORE, PREMISES CONSIDERED, Char-Lite Briquetts, Inc. and Pine-O-Pine Company pray that should any judgment be granted against them in this cause of action that a judgment for indemnification in the amount

of said judgment be granted in their favor against Howard Richardson and David J. Potter and Charles A. Potter, d/b/a Potter and Potter, a partnership, jointly and severally, and for all other equitable and proper relief to which they are entitled.

By: /s/ R. Gary Nutter,
Attorney for Char-Lite
Briquetts, Inc. and
Pine-O-Pine Company

FILED 2nd day of September, 1977 at 9 o'clock a.m.
/s/ Joe T. Rhodes, Chancery Clerk.

APPENDIX "O"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

JUDGMENT ON MANDATE

On the 11th day of October, 1977, after notice to all parties, a hearing was held relating to the request of the plaintiff, Sam Jones, for a judgment on mandate. The plaintiff, Sam Jones, appeared through his attorney, Robert C. Compton; the defendant, John Hardisty, appeared in person and through his attorney, Allen P. Roberts; the garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, appeared through their attorney, Gary Nutter; the cross-defendant, E. C. Hochendel, appeared through his attorney, W. A. Eckert, and the intervenors, David J. Potter and Charles A. Potter, d/b/a Potter and Potter, appeared through David J. Potter. It was announced in open Court that the defendant, Howard Richardson, is deceased, and Boyd Tackett is the attorney of record for Richardson and Potter and Potter.

Thereupon, statements and arguments were made by counsel and the questions were taken under advisement.

NOW, on this 17th day of November, 1977, the Court, being well and sufficiently advised, finds:

1.

As directed by the Opinion of the Supreme Court of Arkansas dated May 31, 1977, and the Mandate of that Court dated July 5, 1977, the Decree of this Court dated April 12, 1972, and filed herein on April 17, 1972, is hereby reinstated as of April 17, 1972. The Plaintiff, Sam Jones is entitled to recover the additional sum of $701.76 from the defendants, John Hardisty and Howard Richardson, for his costs in the Supreme Court of Arkansas.

2.

The writs of garnishment issued on November 18, 1975, and April 20, 1976, against the garnishees and third party complainants herein, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, should be given full force and effect.

3.

From the pleadings filed herein by the said garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, captioned "Cross-Complaint and Third-Party Complaint", along with the indemnity agreement attached thereto and the answer to cross-complaint and third-party complaint filed by David J. Potter of Potter & Potter as attorneys for cross-defendant and third-party defendants, the plaintiff, Sam Jones, is awarded judgment against the said garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, in the sum of $13,942.00. The said garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, should be given judgment over against Howard Richardson and David J. Potter and Charles A. Potter d/b/a Potter and Potter, a partnership, in the sum of $13,942.00.

4.

The relief sought by the defendants, garnishees, and intervenors by pleadings filed herein subsequent to May 31, 1977, the date of the Opinion of the Supreme Court of Arkansas, is hereby denied for want of equity.

As to the third-party complaints of John Hardisty and Howard Richardson which were presented to this Court by pleadings and evidence on April 20, 1972, and then next taken under advisement and briefs submitted by the parties but no decision yet rendered, the Court finds that the third-party complaints of John Hardisty and Howard Richardson against E. C. Hochendel and Pine-O-Pine Company should be dismissed for want of equity.

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the judgment of this Court dated April 12, 1972, and filed herein on April 17, 1972, is hereby reinstated for all purposes effective April 17, 1972. It is further ORDERED that the plaintiff, Sam Jones, have and recover the additional sum of $701.76 from the defendants John Hardisty and Howard Richardson, representing plaintiff's costs expended in the Supreme Court of Arkansas on the appeal.

IT IS FURTHER ORDERED that the relief sought by the defendants, garnishees, and intervenors by pleadings filed herein subsequent to May 31, 1977, the date of the Opinion of the Supreme Court of Arkansas, is hereby denied for want of equity.

IT IS FURTHER ORDERED that the third-party complaints of John Hardisty and Howard Richardson, presented to the Court on April 20, 1972 and taken under advisement, are hereby dismissed for want of equity.

IT IS FURTHER ORDERED that the garnishments of November 18, 1975, and April 20, 1976, should be given full force and effect and based upon the pleadings filed herein, particularly the pleading filed by the garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, captioned "Cross-Complaint and Third-Party Complaint" with the indemnity agreement attached thereto and the answer to cross-complaint and third-party complaint filed by David J. Potter of Potter and Potter as attorneys for cross-defendant and third-party defendants, the plaintiff, Sam Jones, is hereby given judgment against the garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, in the sum of $13,942.00. It is further ORDERED that the said garnishees, Char-Lite Briquetts, Inc. and Pine-O-Pine Company, have judgment over Howard Richardson and David J. Potter and Charles A. Potter, d/b/a Potter and Potter, a partnership, in the sum of $13,942.00.

IT IS SO ORDERED.

/s/ Charles E. Plunkett,
Chancery Judge

FILED 18th day of November, 1977 at 8:00 o'clock a.m.
/s/ Joe T. Rhodes, Chancery Clerk.

APPENDIX "P"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

vs. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

vs.

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

APPLICATION FOR NEW TRIAL

NOW comes Howard Richardson, deceased, and David J. Potter and Charles Potter, d/b/a Potter & Potter, Attorneys, applicants, by and through their attorney, Boyd Tackett, and for their application for a new trial pursuant to Ark. Stats. 27-1901, et seq., would respectfully show the Court as follows:

I.

That on the 17th day of November, 1977, the trial court in this cause executed a "Judgment on Mandate". Said judgment was forwarded by letter dated November 17, 1977 for entry by the Chancery Clerk. That this application for a new trial is within fifteen days of the rendition of the decision of the Court reflected in the "Judgment on Mandate".

II.

That the grounds upon which application is made for a

new trial are several, the first of which is that an irregularity in the proceedings of the court and in the "Judgment on Mandate" occurred and was an abuse of discretion by which the applicants for a new trial herein were prevented from having a fair trial. Specifically, applicants are entitled upon appeal to a trial de novo in the Supreme Court of all issues raised in these proceedings. By virtue of the interest of David J. Potter and Charles Potter, d/b/a Potter & Potter, as indemnifiers upon the garnishment, and by virtue of their right to subrogation against all parties who may legally owe any or all of the debt to Sam Jones if said debt is sustained upon appeal, said applicants, Potter & Potter, are vitally interested in the third party actions of Howard Richardson and John Hardisty against E. C. Hochendel and Pine-O-Pine Company as Third Party Defendants in the original cause of action. That this cause of action was dismised "for want of equity" without further explanation by the trial court and without recitation that the court had examined the transcript of testimony and record which has been completed and filed with the Supreme Court. Further, the applicants, Richardson and Potter & Potter, were denied due process upon all of the issues raised in their First Amended Answer to Cross Complaint and Third Party Complaint and in their prayer for set-off and counterclaim against garnishees, and were further denied a hearing and a record on their intervention, and David J. Potter and Charles Potter were denied a hearing on their third party action against Howard Richardson, John Hardisty, E. C. Hochendel and Pine-O-Pine Company. Therefore, by denial of a hearing, applicants herein were denied a right to a record to be presented on appeal for a trial de novo and would make impossible a determination by the appellate court of the issues presented.

III.

Applicants herein desire to make a record and present evidence on all issues raised in the First Amended Answer to Cross-Complaint and Third Party Complaint including the set-off and counterclaim against garnishees, the intervention of applicants Richardson and Potter & Potter and upon the third party complaint. Among other evidence too extensive to present in this application, applicants would like an opportunity to make a record and present evidence surrounding the exhibits attached hereto and marked "Exhibit A" consisting of the Judgment in Cause No. 7647 in the Chancery Court of Lafayette County and specifically the last paragraph of Paragraph II, page 5 wherein the Court awarded a judgment for all sums due Mr. Richardson under the Exclusive License Agreement to be paid into the Registry of the Court for disbursement to the Merchants National Bank of Mobile, Alabama, subject to attorney's fees of Plaintiff's attorney. That portion of the judgment and decree of Judge Love dated November 20, 1974, was not appealed to the Supreme Court and no issue was raised on appeal. Secondly, Potter & Potter desire to testify to the facts surrounding the Transfer of Assignment and Stipulation of Attorney-in-fact and the cover letter forwarding said assignment and stipulation dated May 7, 1976 from Mr. Peter C. Petroutson, Senior Vice President of the Merchants National Bank of Mobile, Alabama and the facts surrounding the letter dated June 2, 1976, attached hereto and incorporated herein, marked "Exhibit B" wherein the Merchants National Bank of Mobile was paid from the proceeds in Cause No. 7647 from Pine-O-Pine in the amount of $13,942.00.

Applicants for a new trial herein would show the

Court that they desire to introduce into evidence the checks which disbursed the $13,942.00 to the parties truly entitled to receive said sums. Copies of said checks are attached hereto and marked "Exhibit C". Said checks reflect that H. E. Richardson was truly entitled to only $5,100.00 net of the attorney's fees due to Boyd Tackett and David J. Potter and net of the payment to the Merchants National Bank of Mobile, Alabama. Applicants for new trial herein pray for an opportunity to present evidence and testimony for consideration of the Arkansas Supreme Court in a trial de novo regarding all issues raised in the pleadings of applicants.

IV.

The second ground for new trial is the sixth ground as set out in Ark. Stat. 27-1901, specifically, that the decision is not sustained by sufficient evidence and is contrary to law. Specifically, the Judgment on Mandate entered a judgment in garnishment and judgment on an indemnity agreement without affording an opportunity to be heard and without presentation of any evidence whatsoever. That the pleadings on file of the various parties raised issues of fact and are not subject to a summary judgment and a judgment should not have been entered without an opportunity for the various parties to adduce evidence on the issues. Furthermore, the Court, in Paragraph IV of the "Judgment on Mandate" denied for want of equity relief sought by the Defendant, Garnishees and Intervenors by pleadings filed subsequent to May 31, 1977. Again, no hearings were held on said pleadings and there is no basis in the record for said pleadings to be denied for want of equity. Applicants herein have been denied due process guaranteed them under the Fifth and Fourteenth Amendments of the United States Constitution and under the substantive laws

of the State of Arkansas. That said ruling was not sustained by sufficient evidence and is contrary to law.

V.

Attached hereto and incorporated herein for all purposes is Exhibit "D" consisting of an affidavit of David J. Potter setting forth the history of the collection and disbursement of the $13,942.00 from Pine-O-Pine, which applicants herein desire to set forth in more detail in the evidence in this cause. Said evidence would refute any possible basis for a dismissal of the pleadings for "want of equity".

VI.

That since Boyd Tackett undertook to represent H. E. Richardson, and after the Mandate of the Arkansas Supreme Court requiring reinstatement of the Judgment in favor of Sam Jones against Defendants herein, H. E. Richardson became ill and died. Although authorized to do so before Mr. Richardson's death, the attorney for H. E. Richardson is in the difficult position of representing his interest without the appointment of a temporary administrator of his estate. That the attorney for H. E. Richardson desires that the Court appoint a temporary administrator for purposes of representing the interest of the estate of H. E. Richardson and giving to Boyd Tackett the continuing authority to represent his interest, prior to any judgment being entered against the said H. E. Richardson, deceased. At the time of the pre-trial on the 11th day of October, 1977, the widow of H. E. Richardson stated that she would be appointed as administratrix of his estate for the purposes of giving to Boyd Tackett the right to continue to represent his interest. Although such assurances were made, no administration

has been taken and no appointments made. Although the attorney herein, Boyd Tackett, originally had authority to represent Mr. Richardson, serious doubts exist in said attorney's mind as to his right to continue to represent his interest and in the validity of any judgment taken against him after his death without the appointment of a temporary administrator, which this Honorable Court has the right and authority to do.

VII.

On or about October 11, 1977, a conference among the attorneys in this cause was held for the purpose of determining what judgment should be entered upon the Mandate of the Supreme Court in this cause. At that time, it was the position of applicants herein that the Opinion and Mandate merely required the trial court to reinstate the Judgment of Sam Jones as Judge Rowan had the right to do. However, it was the position of the applicants herein that said reinstatement should be effective as of the date of reinstatement and not as of some five years prior. However, if the Court decided, as it did in the Judgment on the Mandate that the Judgment should be effective as of April 12, 1972, applicants requested and suggested to the Court the necessity for a trial on all of the issues. That request was reiterated in a letter dated October 20, 1977, a file copy of which is attached hereto and incorporated herein for all purposes and marked "Exhibit E".

WHEREFORE, PREMISES CONSIDERED, applicants, H. E. Richardson, deceased, and David J. Potter and Charles Potter, d/b/a Potter & Potter, Attorneys at Law, pray that the "Judgment on Mandate" be vacated as per Ark. Stat. 27-1901 and that a hearing be held for the purpose of

adducing evidence on all issues raised by the pleadings and upon which a trial de novo may be had in the Arkansas Supreme Court from an appeal in this cause. In the event this application is denied, or in the event the Court fails to rule within the time provided by law, applicants herein give their notice of appeal and designate the transcript of testimony of all proceedings before the Honorable Jim Rowan, deceased, and designate all pleadings filed to date and all orders of the Court in this cause.

By: /s/ Boyd Tackett,
Attorney for H. E. Richardson,
Deceased, and David J. Potter and
Charles Potter, d/b/a Potter &
Potter, Attorneys at Law

APPENDIX "Q"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

ORDER

The motion of Howard Richardson, deceased, David J. Potter and Charles Potter, and the motion of John Hardisty, both now pending before the Court, are hereby set for hearing in Camden, Ouachita County, Arkansas, at 10:00 a.m. on January 5, 1978.

DATED this 20th day of December, 1977.

/s/ C. E. Plunkett, Chancery Judge

FILED 21st day of December, 1977 at 9:30 o'clock a.m.
Joe T. Rhodes, Chancery Clerk
By: /s/ Theda J. Perry, DC
Recorded in Chancery Record Book "U", at page 530.

APPENDIX "R"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

VS. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishee*

ANSWER OF E. C. HOCHENDEL

COMES E. C. Hochendel and for his Answer to the Third Party Complaint filed by David J. Potter and Charles A. Potter states:

I.

E. C. Hochendel denies each and every material allegation in the Third Party Complaint which is not admitted herein.

II.

E. C. Hochendel denies that he is liable to David J. Potter and Charles A. Potter for any sums whatever and denies that he entered into an indemnity agreement such as is alleged in the Third Party Complaint.

III.

E. C. Hochendel states that Potter & Potter as his attorneys were retained and paid to represent E. C. Hochendel; that the failure of his attorneys as alleged to adequately

represent him constitute grounds for relief of any claim arising out of the attorney-client relationship existing between the parties.

IV.

E. C. Hochendel pleads as a defense of any claim by Potter & Potter the attorney-client relationship, waiver, estoppel, laches and the statutes of limitations.

WHEREFORE, E. C. Hochendel prays that the Third Party Complaint filed against him by David J. Potter and Charles A. Potter be dismissed for want of equity.

/s/ W. A. Eckert,
Attorney for E. C. Hochendel

FILED 6th day of January, 1978 at 8:00 o'clock a.m.
/s/ Joe T. Rhodes, Clerk

APPENDIX "S"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES ..... *Plaintiff*

vs. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

ANSWER OF JOHN HARDISTY

Comes now John Hardisty by his attorney, Allen P. Roberts, and for his answer to the Third Party Complaint of David J. Potter and Charles A. Potter, d/b/a Potter and Potter, states and alleges:

I.

John Hardisty denies each and every material allegation in said Third Party Complaint.

II.

John Hardisty denies that he is liable to David J. Potter and/or Charles A. Potter for any sums whatever.

III.

John Hardisty employed Potter and Potter to represent him in this cause. Potter and Potter failed to adequately represent him. Said failure constitutes grounds for relief from and a bar to any relief to which Potter and Potter might otherwise be entitled.

IV.

John Hardisty pleads the attorney-client relationship, waiver, estoppel, laches and the statute of limitations as alternative defenses to any claim of Potter and Potter.

WHEREFORE, John Hardisty prays that the Third Party Complaint of David J. Potter and Charles A. Potter, d/b/a Potter and Potter, be dismissed for want of equity.

By: /s/ Allen P. Roberts

FILED with the Court 1/6/78 at 4:05 p.m.
/s/ C. E. Plunkett, Chancellor

APPENDIX "T"

IN THE CHANCERY COURT OF
LAFAYETTE COUNTY, ARKANSAS
FIRST DIVISION

SAM JONES .... *Plaintiff*

vs. No. 7442

JOHN HARDISTY AND
HOWARD RICHARDSON ..... *Defendants*

CHAR-LITE BRIQUETTS, INC. AND
PINE-O-PINE COMPANY ..... *Garnishees*

ORDER

By order of this Court dated December 20, 1977, the motion of Howard Richardson, deceased, David J. Potter and Charles Potter, and the motion of John Hardisty were set for hearing in Camden, Ouachita County, Arkansas, at 10:00 o'clock a.m. on January 5, 1978.

On this 5th day of January, 1978, the said motions come on for hearing, the parties appearing through their attorneys, Boyd Tackett, R. Gary Nutter, Allen P. Roberts, W. A. Eckert, Jr. and Robert C. Compton.

The Court being well and sufficiently advised finds that the application for new trial filed herein by Howard Richardson, deceased, and David J. Potter and Charles Potter, d/b/a Potter & Potter, attorneys, should be and is hereby denied.

The Court being well and sufficiently advised finds that the separate motion of John Hardisty to set aside judgment on mandate or for a new trial should be and is hereby denied.

/s/ C. E. Plunkett, Chancery Judge

FILED 11th day of January, 1978 at 10 o'clock a.m.
/s/ Joe T. Rhodes, Chancery Clerk.

APPENDIX "U"

DIVISION 1

SUPREME COURT OF ARKANSAS

No. 203

JOHN HARDISTY, CHAR-LITE BRIQUETTS, INC., PINE-O-PINE COMPANY, AND DAVID POTTER AND CHARLES A. POTTER, d/b/a POTTER & POTTER, *Appellants* VS. SAM JONES AND E. C. HOCHENDEL, *Appellees*	Opinion Delivered April 2, 1979 Appeal from Lafayette Chancery Court CHARLES E. PLUNKETT, *Chancellor* Modified and affirmed.

GEORGE ROSE SMITH, *Associate Justice*

GEORGE ROSE SMITH, J. This litigation began more than ten years ago, in February of 1969. There have been two appeals to this court. *Char-Lite Briquetts v. Richardson,* an unpublished opinion noted in 259 Ark. xix (1976), and *Jones v. Hardesty,* 261 Ark. 716, 551 SW2d 543 (1977). After the cause had been remanded to the chancery court pursuant to our opinion on the second appeal, the chancellor sought to bring the case to an end by a decree resolving all the remaining issues. This appeal is from that decree. Three separate briefs have been filed by the four appellants, Hardisty (sometimes spelled Hardesty), Char-Lite, Pine-O-Pine, and Potter & Potter, a law firm. The appellees are the plaintiff Sam Jones and E. C. Hochendel.

In 1969 Jones brought suit against Hardisty and H. E. Richardson to recover judgment upon a $30,000 note which the defendants had given Jones for the purchase of stock

in Char-Lite, a company making charcoal. The defendants interposed defenses of alteration of the note and misrepresentation in the sale of stock. They also filed a counterclaim against Jones. Apart from the basic litigation between Jones and the two defendants, the latter filed two separate third-party complaints in which Jones had no direct pecuniary interest: (1) Hardisty sued the appellee Hochendel, alleging that Hochendel had assumed Hardisty's liability to Jones on the note and should indemnify Hardisty for any recovery by Jones, and (2) Richardson sued the appellant Pine-O-Pine, a Texas corporation, alleging that it had assumed $14,000 of Richardson's liability on the Jones note.

We first consider Hardisty's appeal. On March 23, 1972, the original case between Jones as plaintiff and Hardisty and Richardson as defendants was fully tried upon the complaint, the answer, the counterclaim, and oral testimony. It was agreed that all the other issues (raised by the third-party complaints) would be tried separately on April 20. At the close of the hearing the chancellor, Judge Rowan, took the case under advisement. On April 12 Judge Rowan signed a decree awarding Jones judgment upon the $30,000 note, with interest, and dismissing the counterclaim. That decree was filed with the clerk on April 17 and duly recorded by the clerk.

The remaining issues were tried on April 20, as agreed. Jones had already won his case and was not present either in person or by counsel. At the beginning of the hearing the attorney for the third-party plaintiffs (the original defendants) stated that he would like to have an order withholding the entry and effect of the earlier decree. Judge Rowan replied that "the court . . . considers the order

of April 12, 1972, to be an interlocutory order and not a final order." A docket entry to that effect was made, but the recorded order itself was not disturbed. At the close of the hearing the case was taken under advisement. Briefs were submitted, but Judge Rowan died before he reached a decision in the case.

In November, 1975, Jones obtained writs of garnishment against Char-Lite and Pine-O-Pine, alleging that they were indebted to the defendants Hardisty and Richardson. The garnishees answered that they were not indebted to the defendants, because that litigation was on appeal (the first appeal to this court). Our opinion on that appeal, delivered April 19, 1976, awarded Richardson a judgment against Pine-O-Pine for $13,942.

On the day after our opinion was announced Jones obtained new writs of garnishment. It was then discovered that Jones's complaint against the defendants had been dismissed for want of prosecution on January 20, 1975. Chancellor Plunkett, relying upon Chancellor Rowan's docket entry finding the decree of April 12, 1972, to be merely interlocutory, held that Jones had no judgment and therefore quashed the attempted garnishment. On the second appeal we upheld the validity of Jones's judgment and remanded the cause for further proceedings. *Jones v. Hardesty, supra.*

Hardisty now contends that he is entitled to a de novo review of the controversy that was tried before Judge Rowan on March 23, 1972, and decided by him in the April 12 decree. We cannot sustain that argument. Our opinion in *Jones v. Hardesty* held, in substance, that the April 12 decree was a final judgment which was not affected by Judge Rowan's oral statement or by his docket entry.

Jones's judgment was a matter of record. Neither he nor his attorney had any reason to be present at the April 20 hearing on the third-party complaints or any notice of the docket entry. Judge Rowan's docket entry simply had no effect. The April 12 decree became final when no appeal was taken and is conclusive of the issues which Hardisty now seeks to raise by asking for a de novo review. *Jeffery v. Trevathan,* 215 Ark. 311, 220 SW2d 412 (1949).

Hardisty also contends, as against the appellee Hochendel, that Hochendel, in purchasing Char-Lite stock from Hardisty, agreed to assume Hardisty's liability upon the $30,000 note to Jones. Hochendel replies that he assumed no personal liability as to Jones, the agreement being that the note was payable from Char-Lite earnings. This is the pertinent language of the contract by which Hardisty sold stock to Hochendel:

> That for the further consideration of the purchase of said shares of stock Hochendel agrees to assume the personal liability of John A. Hardesty on the following two described notes:
>
> > Note to Shelby R. Blackmon, dated September 27, 1967, for the total sum of Nine Thousand Dollars ($9,000.00) . . .
> >
> > Note to Sam Jones, dated September 27, 1967, for the total sum of Thirty Thousand Dollars ($30,000.00), to be paid from the earnings of Char-Lite Briquetts, Incorporated.

The chancellor was right in sustaining Hochendel's position. It is true that the language of the contract is somewhat contradictory, in that Hochendel assumes Hardisty's "personal liability" on the notes, but a subparagraph

then provides that the Jones note is to be paid from the earnings of Char-Lite. We construe the reference to personal liability to be limited to Hardisty's liability on the first note, to Blackmon. The general reference to personal liability is then qualified by the specific statement that the Jones note is to be paid from Char-Lite earnings. We perceive no other way of giving effect to both clauses in the contract, which must have been intended to have some meaning.

We next consider the appeal of the Potters, law partners. They represented Richardson on the first appeal, in which Richardson received a $13,942 judgment against Char-Lite and Pine-O-Pine. Jones, as a judgment creditor of Richardson, promptly obtained a writ of garnishment against Char-Lite and Pine-O-Pine, seeking to reach the garnishees' indebtedness to Richardson. The two garnishees, being uncertain about the validity of Jones's judgment, which had not yet been sustained on the second appeal to this court, paid the amount of the $13,942 judgment in favor of Richardson, but took an indemnity agreement by which Richardson and the Potters agreed to hold the garnishees harmless, up to that amount, as against any judgment resulting from the garnishments. The Potters and Richardson intervened in the garnishment proceeding, attacking the validity of the writs of garnishment.

It is argued that the writs of garnishment should be set aside, because a judgment debtor is not subject to garnishment. *Trowbridge v. Means,* 5 Ark. 135, 39 Am. Dec. 368 (1843). It is explained in *Trowbridge,* however, that the reason for the rule is to protect the judgment debtor against the possibility of double liability, both to the judgment creditor and to the garnishing creditor. Here

Char-Lite and Pine-O-Pine elected to protect themselves against that possibility by means of an indemnity agreement from the judgment creditor. They are thus not in a position to invoke the *Trowbridge* rule.

It is next argued that the writs of garnishment are invalid, because Richardson died before the chancery court entered judgment on our mandate after the second appeal. It may be that Richardson's personal representative could raise that issue, but it has not been done. To the contrary, Richardson's attorney joined in a motion for new trial which began: "Now comes Howard Richardson, deceased, and . . . Potter & Potter . . ." There does not appear to have been any insistence in the trial court that Richardson's death prevented further proceedings with regard to the garnishment. The point cannot be raised for the first time on appeal, nor by anyone other than Richardson's personal representative.

It is next argued that the chancellor erred in holding that Jones's garnishment had priority as to the entire $13,942 judgment that Richardson obtained on the first appeal. This argument has merit. An attaching or garnishing creditor is not in the position of an innocent purchaser for value. He takes subject to valid existing claims of third persons. *Tennant v. Watson,* 58 Ark. 252, 24 SW 495 (1893); *Taylor v. Mississippi Mills,* 47 Ark. 247, 1 SW 283 (1886). Specifically, we have held that an attorney's inchoate lien for his fee is superior to a writ of garnishment issued against the recovery he has obtained for his client. *McNeill v. Percy,* 201 Ark. 454, 145 SW2d 32 (1940). Richardson's judgment against Char-Lite and Pine-O-Pine was subject to attorneys' fees of $8,082.52 and to an assignment of $754.48, leaving a difference of $5,105 that was owed to

Richardson himself. The trial court's judgment in favor of Jones against the garnishees, and their judgment over against their indemnitors, are accordingly reduced to $5,105.

The Potters also argue that the chancellor should not have entered a final decree without affording them a trial upon the issues raised by their pleadings. We are not aware of any issues not disposed of by this opinion, but in any event the chancellor, before entering his decree, afforded all parties an opportunity to make a record by proffering whatever testimony they wished to introduce. Thus it cannot be said that a hearing on the merits has been denied.

Finally, the separate appeal of Char-Lite and Pine-O-Pine does not require extended discussion. For the most part they merely adopt the arguments presented by the other appellants, which we have discussed. In fact, the apparent purpose of these two appellants is to protect their right of indemnity from Richardson and the Potters if the chancellor's decree should be modified. What we have already said in modifying the decree provides the necessary protection to Char-Lite and Pine-O-Pine.

The decree, as modified, is affirmed.

We agree. Harris, C.J., and Byrd and Purtle, JJ.